



STATE OF WASHINGTON  
**ENVIRONMENTAL AND LAND USE HEARINGS OFFICE**

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October 2, 2019

**Sent by Email and US Mail**

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Re: **PCHB No. 19-043c**  
**WASHINGTON ASSOCIATION OF SEWER AND WATER DISTRICTS and**  
**PUGET SOUNDKEEPER ALLIANCE V. STATE OF WASHINGTON,**  
**DEPARTMENT OF ECOLOGY**  
**SNOHOMISH COUNTY, CITY OF SEATTLE, CITY OF TACOMA, PIERCE**  
**COUNTY, CITY OF BELLEVUE, and KING COUNTY (Intervenors)**



Dear Parties and Intervenors:

Enclosed is a Consolidation and Prehearing Order in the above matter. Please read over the Order carefully for filing dates and requirements.

If you have any questions, please feel free to contact the staff at the Environmental and Land Use Hearings Office at 360-664-9160.

Sincerely,



Carolina Sun-Widrow, Presiding

CSW/le/P19-043c  
Encl.

**CERTIFICATION**

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through State Consolidated Mail Services to the attorneys of record herein.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED 10/2/19, at Tumwater, WA.



**POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON**

WASHINGTON ASSOCIATION OF  
SEWER AND WATER DISTRICTS and  
PUGET SOUNDKEEPER ALLIANCE,

Appellants,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent,

And

SNOHOMISH COUNTY, CITY OF  
SEATTLE, CITY OF TACOMA, PIERCE  
COUNTY, CITY OF BELLEVUE, and  
KING COUNTY,

Intervenor-  
Respondents.

PCHB No. 19-043c

CONSOLIDATION AND PREHEARING  
ORDER

Washington Association of Sewer and Water Districts (WASWD) filed an appeal with the Pollution Control Hearings Board (Board) on July 29, 2019, challenging the Phase I Municipal Stormwater Permit (Phase I Permit), Western Washington Phase II Stormwater Permit, and Eastern Washington Phase II Municipal Stormwater Permit (collectively, Phase II Permits). The Department of Ecology (Ecology) issued the Permits on July 1, 2019.

Puget Soundkeeper Alliance (PSA) filed an appeal with the Board on July 31, 2019, challenging Phase I and Phase II Municipal Stormwater Permits.

Several cities and counties moved for and obtained orders granting their petitions to intervene in the three appeals.<sup>1</sup> A prehearing conference was held on September 23, 2019.<sup>2</sup> Board Member Carolina Sun-Widrow presided for the Board. The following attorneys appeared on behalf of the parties and Intervenor-Respondents:

Parties	Appeared through:
WASWD	Attorney James A. Tupper, Jr., Tupper Mack Wells PLLC
PSA	Attorney Janette K. Brimmer, Earthjustice
Ecology	Thomas J. Young, Senior Counsel; Phyllis J. Barney, Assistant Attorney General
Intervenor-Respondents	Appeared through:
Snohomish County	Alethea Hart, Deputy Prosecuting Attorney; Jessica Kraft-Klehm, Deputy Prosecuting Attorney
City of Seattle	Theresa R. Wagner, Assistant City Attorney
City of Tacoma	Attorney Lori A. Terry, Foster Pepper PLLC
Pierce County	Attorney Lori A. Terry, Foster Pepper PLLC

<sup>1</sup> See Order Granting Snohomish County's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 6, 2019); Order Granting City of Seattle's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 13, 2019); Order Granting City of Tacoma's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 17, 2019); Order Granting Pierce County's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 18, 2019); Order Granting City of Bellevue's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 20, 2019); Order Granting King County's Pet. to Intervene, PCHB No. 19-043, 19-045, 19-046 (Sept. 25, 2019). By letter dated September 19, 2019, the undersigned granted King County's request to participate in the prehearing conference, prior to issuing an order on King County's pending petitions to intervene because due to the filing date of King County's petitions, the five-day period for filing responses to the petitions would not have expired until after the prehearing conference. At the prehearing conference, parties and intervenor-respondents either did not object to, or took no position on, King County's Petitions to Intervene.

<sup>2</sup> The prehearing conference was held at the Board's hearing room in Tumwater, WA, due to the large number of anticipated participants. Parties and intervenor-respondents participated in the conference either in person or by telephone.

City of Bellevue	Catherine A. Drews, Assistant City Attorney; Attorney Stephen J. Tan, Cascadia Law Group PLLC
King County	Mark Stockdale, Sr. Deputy Prosecuting Attorney

Based on the conference and the materials submitted, the Board enters the following  
Prehearing Order:

### **I. CONSOLIDATION**

WASWD opposed consolidating its appeal, No. 19-043, with PSA's appeals, No. 19-045 and No. 19-046, on the basis that its legal issues are separate and distinct from the legal issues raised in PSA's appeals, therefore making it burdensome for WASWD to participate in discovery, motion practice, and hearing on PSA's appeals. WASWD took no position on consolidating PSA's two separate appeals.

PSA favored consolidating its two appeals because the issues are similar and overlap, but took no position on consolidating its two appeals with WASWD's appeal in No. 19-043.

Ecology favored consolidation of the three appeals as they share the same permits as the subject matter of the appeals.

The six Intervenor-Respondents were either in favor of, or did not oppose, consolidating all three appeals.

Although not all of the issues in the three appeals overlap, the three appeals all have the permits as the subject matter of the appeals. Consolidating these appeals will expedite their disposition, avoid duplication of testimony, and not prejudice the rights of the parties. WAC

1 371-08-390(9). WASWD's claimed burdens from consolidation can be subsequently alleviated  
2 through hearing organization logistics and efficient presentation of witnesses, among other  
3 means. The three appeals are therefore consolidated under case caption **PCHB No. 19-043c**.

## 4 **II. HEARING**

5 The hearing in this matter is set for **12 days**, between **May 11-28, 2020**, commencing at  
6 **9:00 a.m.**, at the Board's office in Tumwater, Washington. Parties shall be prepared to proceed  
7 to hearing on that date. Besides Memorial Day on May 25, 2020, there will be no hearing on one  
8 other day during the hearing period.

9 The Presiding Officer will conduct a Prehearing Conference on **May 6, 2020, at 2:00**  
10 **p.m.** to discuss the conduct of the hearing. To participate in this Prehearing Conference you will  
11 need to call the following telephone number and enter the pin code on the specified date and time  
12 above:

13 **Telephone Number 1-800-704-9804**  
14 **Pin Code 62727645#**

## 15 **III. MEDIATION AND SETTLEMENT**

16 The parties are encouraged to undertake settlement efforts. The parties shall notify the  
17 Board jointly by **March 23, 2020**, of the settlement possibilities in the case. The parties were  
18 informed that the Environmental and Land Use Hearings Office offers no-cost mediation  
19 services. If the parties desire to use these services, they should telephone or send a written  
20 request to the Environmental and Land Use Hearings Office.

1 **IV. ISSUES**

2 The Appellants worked separately with Ecology on the following agreed legal issues  
3 which will govern the case:

- 4 1. Do the permits and the stormwater management manuals, fail to adequately  
5 ensure that discharges to groundwater will not prevent the movement of  
6 contaminants into underground sources of drinking water prohibited under 40  
7 CFR § 144.12( a).
- 8 2. Do the permits fail to adequately ensure that authorized discharges to  
9 groundwater will meet the antidegradation policy in the state Groundwater  
10 Quality Standards, WAC 173-200-030(1 ).
- 11 3. Do the permits fail to protect groundwater resources and regulate by excluding  
12 coverage for underground injection wells subject to ch. 173-218 WAC where  
13 WAC 173-218-090(1)(c)(i)(C) affords a presumption of compliance with the non-  
14 endangerment standard by municipalities covered under the permits based on  
15 implementation of best management practices in either the Western Washington  
16 Stormwater Management Manual or the Eastern Washington Stormwater  
17 Management Manual.
- 18 4. Do the permits fail to adequately ensure through documentation, design, and  
19 monitoring that discharges to groundwater will comply with the non-  
20 endangerment standard for injection wells in WAC 173-218-080.
- 21 5. Do the permits fail to adequately protect groundwater quality by not including  
specific conditions and standards for operation and maintenance of facilities that  
discharge to groundwater.
6. Do the permits fail to protect groundwater quality by failing to include specific  
conditions, standards, and mitigation for maintaining water quality and potential  
need for closure of UIC well if there is contamination.
7. Do the permits fail to protect groundwater quality by not requiring demonstration  
of the non-endangerment standard in ch. 173-218 WAC for deep underground  
injection wells.

- 1 8. Do the permits, and the stormwater management manuals, fail to adequately  
2 regulate discharges to groundwater within wellhead protection zones and the  
capture areas of public water supply wells.
- 3 9. Do the permits fail to adequately regulate groundwater by not ensuring notice and  
4 consultation with water districts that may be impacted by the wells.
- 5 10. Does the 2019-2024 Phase I Municipal Stormwater Permit's ("Phase I Permit")  
6 Best Management Practices ("BMP") List Approach unlawfully cause or  
7 contribute to violations of water quality standards?
- 8 11. Does the Phase I Permit's BMP List Approach unlawfully allow the discharge of  
9 pollutants that have not been treated with all known available and reasonable  
10 methods of treatment ("AKART") and/or fail to reduce the discharge of pollutants  
11 to the maximum extent practicable ("MEP")?
- 12 12. Does the Phase I Permit's failure to require any implementation of projects  
13 identified through basin-level planning unlawfully cause or contribute to  
14 violations of water quality standards?
- 15 13. Does the Phase I Permit's failure to require any implementation of projects  
16 identified through basin-level planning unlawfully allow the discharge pollutants  
17 that have not been treated with AKART and/or fail to reduce the discharge of  
18 pollutants to the MEP?
- 19 14. Does the Phase I Permit's Condition S.4 fail to require sufficiently stringent  
20 adaptive management measures to ensure the permit does not cause or contribute  
21 to violations of water quality standards?
- 15 15. Do the adaptive management provisions of the Phase I Permit's Condition S.4  
allow the discharge of pollutants that have not been treated with AKART and/or  
that fail to reduce the discharge of pollutants to the MEP?
- 17 16. Does the 2019-2024 Western Washington Phase II Municipal Stormwater  
18 Permit's ("Phase II Permit") Best Management Practices ("BMP") List Approach  
unlawfully cause or contribute to violations of water quality standards?
- 19 17. Does the Phase II Permit's BMP List Approach unlawfully allow the discharge of  
20 pollutants that have not been treated with all known available and reasonable  
21 methods of treatment ("AKART") and/or fail to reduce the discharge of pollutants  
to the maximum extent practicable ("MEP")?

- 1 18. Does the Phase II Permit's failure to require any implementation of projects  
2 identified through basin-level planning unlawfully cause or contribute to  
violations of water quality standards?
- 3 19. Does the Phase II Permit's failure to require any implementation of projects  
4 identified through basin-level planning unlawfully allow the discharge pollutants  
that have not been treated with AKART and/or fail to reduce the discharge of  
pollutants to the MEP?
- 5 20. Does the Phase II Permit's Condition S.4 fail to require sufficiently stringent  
6 adaptive management measures to ensure the permit does not cause or contribute  
to violations of water quality standards?
- 7 21. Do the adaptive management provisions of the Phase II Permit's Condition S.4  
8 allow the discharge of pollutants that have not been treated with AKART and/or  
that fail to reduce the discharge of pollutants to the MEP?
- 9 22. Does the Phase II Permit's failure to require any Phase II jurisdictions, regardless  
10 of size, rate of development, or ecological importance of the relevant watersheds,  
to apply structural stormwater controls unlawfully cause or contribute to  
violations of water quality standards?
- 11 23. Does the Phase II Permit's failure to require any Phase II jurisdictions, regardless  
12 of size, rate of development, or ecological importance of the relevant watersheds,  
13 to apply structural stormwater controls unlawfully allow the discharge pollutants  
that have not been treated with AKART and/or fail to reduce the discharge of  
pollutants to the MEP?

14 Intervenor-Respondents either: (1) submitted their own proposed legal issues that were  
15 substantively similar to the parties' agreed legal issues listed above; or (2) submitted their own  
16 proposed legal issues that were substantively similar to the parties' agreed legal issues listed  
17 above and additionally requested the opportunity to work with parties on agreed legal issues; or  
18 (3) did not submit legal issues (consistent with their statements in their respective petitions to  
19 intervene and with the Board's orders granting intervention), but requested the opportunity to  
20 confer with parties and submit new agreed legal issues.  
21

1 The orders granting intervention were specifically conditioned on the undersigned  
2 subsequently limiting the Intervenor-Respondents' participation in the appeals to ensure orderly,  
3 prompt, and efficient proceedings. The proposed legal issues that were submitted by two of the  
4 Intervenor-Respondents were substantively similar to the parties' agreed legal issues. Granting  
5 the Intervenor-Respondents' requests to further refine the parties' agreed legal issues will cause  
6 further delay with little to no countervailing benefit since Intervenor-Respondents did not state  
7 that the parties' agreed legal issues were improper or deficient. Moreover, the Board generally  
8 does not allow intervenors to raise separate legal issues not raised by the parties. *See, e.g.,*  
9 *Pierce County v. Dep't of Ecology*, PCHB Nos. 12-093c, 12-097c, p. 6 (Sept. 26, 2013); *City of*  
10 *Woodinville v. Dep't of Ecology*, PCHB No. 15-013, FF 20 (Apr. 22, 2016). Under the  
11 circumstances, the Intervenor-Respondents' requests for additional time to work with the parties  
12 to refine the agreed legal issues is **denied**.

## 13 **V. MOTIONS**

14 1. Dispositive Motions: Motions on any issue that would be dispositive of all or part of  
15 the case shall be filed and served by **January 13, 2020**. Consistent with preliminary discussion  
16 on the format of dispositive motion briefing at the prehearing conference, PSA submitted a  
17 proposed "four brief format" outlining dispositive motion briefing for the undersigned's  
18 consideration. *See* September 27, 2019, Letter from PSA to J. Sun-Widrow Re: Puget  
19 Soundkeeper Alliance v. Dep't of Ecology, PCHB Nos. P19-045, P19-046, (consol. with P19-  
20 043). The letter proposal states that all parties agree with the four brief approach to summary  
21 disposition briefing, but not all parties with the order in submitting the briefing.

1 The undersigned considered the proposal in light of the Board's calendar, the Board's  
2 rules on time allotted for filing responses to dispositive motions and for filing replies to  
3 responses, and the legal issues involved. With the above hearing dates, the following dispositive  
4 motion briefing schedule shall govern:

- 5 • **January 13, 2020:** Appellants' Opening Summary Disposition Motion and Brief  
6 Due.
- 7 • **January 28, 2010:** Respondent's and Intervenor-Respondents' Cross Motions for  
8 Summary Disposition and Response to Appellants' Opening Motion and Briefs Due.  
9 **Each party's and Intervenor-Respondent's Cross Motion and Response shall be**  
10 **clearly separated by heading and identify, by number, the legal issue(s) that is**  
11 **the subject matter of the cross motion and response. Intervenor-Respondents**  
12 **shall endeavor to limit the number of dispositive motions filed by combining**  
13 **motions or by joining in another party's or intervenor-respondents' motion.**
- 14 • **February 11, 2020:** Appellants' Response to Cross Motions and Reply in Support of  
15 Opening Motion Due.
- 16 • **Feb. 18, 2020:** Respondent's and Intervenor-Respondents' Final Reply in Support of  
17 Cross Motions.

18 For dispositive motions, responses, and replies, **an original and three (3) copies** of the  
19 pleading and supporting documents shall be filed with the Presiding Officer. **All copies and**  
20 **attachments shall be three-hole punched.**  
21

2. Non-Dispositive Motions: **Responses** to any non-dispositive motion shall be filed and served **five business days from receipt of the motion** by the non-moving party. The moving party shall then have **three business days from receipt of the response to file and serve a reply**. For non-dispositive motions, responses, and replies, **an original and one (1) copy** of the pleading and supporting documents shall be filed with the Presiding Officer. **All copies and attachments shall be three-hole punched.**

3. Motion for Stay: Unless a scheduling letter or order provides otherwise, responses and replies to motions for stay should follow the non-dispositive motions deadlines. **An original and three (3) copies** of the motion, responses, and replies shall be filed with the Presiding Officer. **All copies and attachments shall be three-hole punched.**

4. Oral Argument Not Required. Motions will be decided based on the written record, unless oral argument is requested by a party and granted by the Presiding Officer.

## VI. WITNESSES AND EXHIBITS

The parties submitted preliminary witness and exhibit lists.

A. Final Witness List: Final lists of witnesses shall be served on the parties and filed with the Board by **April 27, 2020**. **An original and three (3) copies** shall be filed. Any witness listed in final lists may be called by any party. The party calling a witness has the responsibility to ensure his/her attendance at the hearing. A witness's expertise shall be established by resume offered as an exhibit.

If Intervenor-Respondents anticipate calling a witness that is not called by the parties, they must file a **motion for leave** to present such witness no later than **April 20, 2020**. The

1 motion, not to exceed four pages, shall demonstrate the relevancy and particularized need for the  
2 testimony sought. Any response must be filed five days after the motion. Any reply must be  
3 filed three days after the response.

4 B. Final Exhibit List and Exhibit Exchange: By **April 20, 2020**, the parties shall  
5 exchange lists of the exhibits intended to be used at the hearing. Parties shall confer and attempt  
6 to reach agreement on exhibits' authenticity and admissibility, as well as eliminate duplicate  
7 exhibits. Copies of exhibits shall be provided to the other party (if requested) within two  
8 working days of such a request. Final exhibit lists shall also be filed with the Board and served  
9 on the other parties by **April 27, 2020**. An **original and three (3) copies** shall be filed. All  
10 exhibits must be introduced in connection with a witness's live or prefiled testimony, unless  
11 stipulated to and admitted by the presiding officer. Parties are asked to submit into evidence  
12 only those portions of voluminous documents actually being referred to or relied upon by a  
13 witness.

14 When meeting with the Presiding Officer prior to the commencement of the hearing, each  
15 party shall have available an **original and three (3) copies** of its exhibits and an index of the  
16 exhibits which shall identify those stipulated to by the parties, and spaces for indicating whether  
17 each exhibit was offered, admitted, or excluded. Each exhibit shall be pre-marked by tab for  
18 identification (A-1, A-2, etc., for appellant; R-1, R-2, etc., for respondent), and so identified on  
19 the exhibit lists. All oversized exhibits shall be marked with the case number. The number given  
20 to an exhibit does not limit the order of its introduction at hearing. Any exhibit listed by one  
21 party may be introduced by another party. **All exhibits shall be three-hole punched, and the**

1 **Board requests that tabbed exhibits be placed in binders if possible. In any event,**  
2 **voluminous exhibits (over 100 pages) must be placed in binders for the convenience of the**  
3 **Board.**

4 **ELECTRONIC EXHIBITS.** The parties are encouraged to use electronic exhibits at  
5 the hearing. Should the parties decide to do so, presentation shall be in the form as outlined on  
6 the Electronic Exhibit Guidelines provided to the parties with this Order. Any party wanting to  
7 use electronic exhibits will inform the Board by **April 20, 2020**, of their intent to do so.

## 8 **VII. DISCOVERY**

9 A. **Completion of Discovery:** Discovery shall be completed by **January 3, 2020**.  
10 Parties should pay particular attention to the time requirements of the superior court civil rules  
11 with regard to interrogatories, depositions, etc. Discovery requests shall be served sufficiently  
12 ahead of the discovery deadline so that the opposing party has the response time allowed by  
13 these rules. (For example, responses to interrogatories are typically due thirty (30) days after  
14 service. *See* CR 33.) Depositions, interrogatories, requests for production or inspection, requests  
15 for admission and the responses shall not be filed with the Board. It is the initiating party's  
16 responsibility to maintain the original together with answers to interrogatories and to make them  
17 available for the proceedings, as necessary.

1 Counsel for intervenor-respondents City of Tacoma and Pierce County submitted the  
2 following proposed language regarding expert witness and rebuttal expert witness disclosure to  
3 all parties and intervenor-respondents.<sup>3</sup> The proposal is incorporated below:

4 **Expert Witness Disclosure:** Thirty (30) days prior to the discovery cut-off deadline, the  
5 parties and intervenors shall disclose to each other the identities of the expert witnesses  
6 they intend to call, including a brief summary of testimony with an attached CV or  
7 resume. Twenty (20) days after receipt of the expert witness disclosure, the parties shall  
8 disclose the identities of rebuttal experts, including a brief summary of testimony with an  
9 attached CV or resume.

10 B. Discovery Disputes: The parties shall endeavor to resolve any discovery disputes  
11 without involving the Board. An original and one (1) copy of discovery motions and supporting  
12 documents must be filed with the Presiding Officer. Any party filing a discovery motion shall  
13 also file a proposed order and shall accompany such filing with an affidavit reciting efforts to  
14 resolve the discovery dispute.

#### 15 **VIII. PREFILED TESTIMONY.**

16 With agreement from all parties, Appellant PSA submitted a proposal for prefiled  
17 testimony, which is incorporated below:

18 All parties, with the exception of Ecology, shall present expert testimony on direct by  
19 way of prefiled written direct testimony. The prefiled testimony shall be provided to the  
20 Board, the parties, and intervenor-respondents three weeks before the start of hearing,  
21 **(April 20, 2020)**. Such expert witnesses must be available at the hearing to briefly  
summarize their prefiled written direct testimony, and for live cross and redirect  
examinations.

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<sup>3</sup> See September 26, 2019, Letter to J. Sun-Widrow from Lori A. Terry Re: PCHB Nos. 19-043,  
045 & 046.

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**IX. BRIEFS**

Prehearing Briefs are required. They shall be filed and served no later than **May 4, 2020**, with an **original and three (3) copies** for the Board (copies to be filed the same day the brief is filed). Briefs are limited to **fifteen (15) pages** absent an order granting a motion to lengthen.

**X. COMMUNICATION**

**COMMUNICATION/CONTACT:** All correspondence and filings with the Board shall be sent to the attention of the Presiding Officer with copies sent at the same time to all other parties. There shall be no *ex parte* contact (contact by one party in the absence of the other party) with the Presiding Officer or other member of the Board.

The Board does not accept e-mail correspondence directed to the presiding officer.

**FAX:** Telefax may be used to communicate with the Board for single copies only and limited to ten (10) pages in length, provided paper copies are mailed the same day.

**E-FILING:** Parties may file pleadings and other papers in this case with the Board by electronic mail, if the original and any required number of copies are mailed the same day. Please include attachments and exhibits with the hard copy, rather than the e-mail filing. The following additional conditions apply to e-filings:

1. The date of “filing” will be the date/time email filings are received by the Board. E-filings received by the Board after 5:00 p.m. on a business day will be considered filed on the next business day. Please note that e-mail is not always received immediately. There may be a significant delay between the time you send your e-mail, and the time the Board receives it. The office has experienced delays of up to two hours, so please plan accordingly.
2. The email address for e-filing is [eluho@eluho.wa.gov](mailto:eluho@eluho.wa.gov).

